

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35765

WICHITA TERMINAL ASSOCIATION, BNSF RAILWAY COMPANY & UNION PACIFIC  
RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

Decided: May 20, 2014

By petition filed on October 18, 2013, Wichita Terminal Association, BNSF Railway Company, and Union Pacific Railroad Company (collectively WTA) request that the Board institute a declaratory order proceeding to resolve a dispute between WTA and F.Y.G. Investments, Inc. and Treatco, Inc. (collectively FYG) regarding a railroad crossing at the proposed Emporia Court in Wichita, Kan. The Board is instituting a declaratory order proceeding and directing the parties to address certain questions related to the dispute.

BACKGROUND

The dispute involves approximately 1,000 feet of WTA's east-west running "interchange tracks" (IT) located south of 25th Street and east of Broadway in Wichita,<sup>1</sup> FYG's real property, also roughly located south of 25th Street and east of Broadway,<sup>2</sup> and a rail crossing from 25th Street to FYG's property.<sup>3</sup> The IT consist of parallel tracks running in a 30 foot right-of-way easement adjacent to 25th Street and along the northern edge of FYG's property.<sup>4</sup> In August 2008, a Kansas district court ordered WTA to construct a crossing from 25th Street to FYG's property at Emporia Court, a proposed public road on FYG's property near the middle point of the IT.<sup>5</sup> In June 2009, the court ordered removal of the north track and its relocation south of the existing south track.<sup>6</sup> Generally, the parties disagree about whether the state court's remedy is preempted by federal law.

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<sup>1</sup> WTA Pet. 2.

<sup>2</sup> Id. at Ex. C, G.

<sup>3</sup> Id. at 3.

<sup>4</sup> In 1996, FYG acquired approximately 27 acres of land that includes the railroad right-of-way along the northern edge of the property adjacent to 25th Street. See FYG Reply 5.

<sup>5</sup> FYG Reply Ex. 6, at 6-7.

<sup>6</sup> FYG Reply Ex. 8, at 7-8.

WTA filed its petition with the Board following 11 years of state district and appellate court proceedings.<sup>7</sup> The state court proceedings began after WTA needed to make repairs to the IT and FYG alleged that WTA personnel were trespassing and attempted to terminate WTA's license to use the property.<sup>8</sup> WTA sought to enjoin FYG from interfering with its right to operate and maintain the IT and argued that it had acquired a prescriptive easement.<sup>9</sup> FYG counterclaimed for an easement by necessity across the tracks based on Kansas property law and a 1916 Wichita ordinance.<sup>10</sup>

FYG argues that the 1916 ordinance gave WTA the right "to construct, operate, and maintain industrial tracks and switches"<sup>11</sup> subject to certain conditions, including that WTA "construct and maintain in good order the portion of sidewalks crossed and railway crossings, and shall keep said track in good repair, and in such condition that teams and vehicles on such street can safely pass over such tracks at any point on said street."<sup>12</sup> Throughout the court proceedings, FYG has relied on this section of the ordinance, which it refers to as a voluntary agreement,<sup>13</sup> for its argument that this dispute is primarily about state property law and that WTA must construct a crossing at Emporia Court.<sup>14</sup>

The initial state district court decision in April 2005 granted summary judgment in favor of WTA, concluding that it "had a right to operate and maintain the [IT] pursuant to a license granted under [the 1916 ordinance] . . . and WTA had no legal duty to provide FYG ingress and egress over the tracks."<sup>15</sup> However, at the February 2007 bench trial on remand from FYG's appeal, the district court concluded that 25th Street is a public street and issued an injunction to

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<sup>7</sup> WTA Pet. 5 (WTA filed its initial district court petition in November 2002 and its Board petition in October 2013).

<sup>8</sup> WTA Pet. Ex. A, at 4; FYG Reply Ex. 4, at Ex. C, D, E.

<sup>9</sup> Wichita Terminal Ass'n v. F.Y.G. Invs., Inc., 109 P.3d 203 (Kan. App. 2005); WTA Pet. Ex. A, at 4-5; FYG Reply Ex. 4.

<sup>10</sup> See Wichita Terminal Ass'n v. F.Y.G. Invs., Inc., 109 P.3d 203 (Kan. App. 2005).

<sup>11</sup> FYG Reply 4, 18-19 (citing Wichita Ordinance 5436). WTA explains that the IT were built sometime between 1889 and 1916 and that WTA began operations over the IT no later than 1922. WTA Pet. 2; FYG Reply 5.

<sup>12</sup> FYG Reply 4, Ex. 1.

<sup>13</sup> FYG Reply 2. FYG also refers to WTA's decision not to appeal the Aug. 1, 2008 decision as a voluntary agreement. See FYG Reply 23.

<sup>14</sup> Id. at 2.

<sup>15</sup> See Wichita Terminal Ass'n v. F.Y.G. Invs., Inc., 109 P.3d 203 (Kan. App. 2005).

provide FYG ingress and egress over the IT.<sup>16</sup> In August 2008, the court issued a written journal entry ordering: (1) WTA to provide and keep clear a crossing to allow ingress and egress to FYG's property; (2) the parties to determine the location for ingress and egress that would be the best economic alternative with the least impact on interstate commerce; and (3) the parties to renew discussions with the City of Wichita to determine where a crossing shall be constructed as the best economic alternative with the least impact on interstate commerce.<sup>17</sup> The district court subsequently found<sup>18</sup> that WTA had provided a temporary timber crossing for FYG and ordered WTA to construct a permanent crossing at the proposed Emporia Court within 90 days after FYG presented engineering drawings of the crossing.<sup>19</sup>

By April 2009, FYG had provided engineering drawings, but WTA had failed to meet the 90-day deadline and the parties returned to court. WTA moved for relief from judgment based on the practical impossibility of placing the crossing at Emporia Court without impeding 25th Street.<sup>20</sup> WTA also argued that "because the proposed crossing location would adversely affect interstate commerce, the [Board] had jurisdiction to review the matter" under the Interstate Commerce Act.<sup>21</sup> Following a hearing in June 2009, the district court added language to the August 1, 2008 order stating that the "crossing shall not impede in any manner the public right-of-way of 25th Street. The plaintiff [WTA] must remove the north track of this crossing if that is

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<sup>16</sup> FYG Reply Ex. 6, at 2, 4. Following the Feb. 20, 2007 bench trial on remand, the district court did not issue the written journal entry and permanent injunction until Aug. 1, 2008. FYG Reply Ex. 5, 6.

<sup>17</sup> FYG Reply Ex. 6, at 4.

<sup>18</sup> The court's initial findings were based on the Feb. 20, 2007 hearing. It is unclear upon what additional evidence, if any, the court's second set of findings and conclusions were based.

<sup>19</sup> FYG Reply Ex. 6, at 4. The district court stated:

[T]he court orders Plaintiffs to construct and install, within 90 days after Defendants' presentation to Plaintiffs of sealed engineering drawings for the construction of Emporia Court street, (i) a permanent railroad crossing at least 32 feet in width at the point where the centerline of the dedicated Emporia Court street intersects the railroad tracks, and (ii) permanent railroad crossing protection in compliance with Federal Railroad Administration Requirements. *Id.*

<sup>20</sup> FYG Reply Ex. 8, at 5. FYG also moved the court to find WTA in contempt.

<sup>21</sup> Wichita Terminal Ass'n v. F.Y.G. Invs., Inc., 246 P.3d 696 (Kan. App. 2011).

the only means to construct the crossing and crossing protection without impeding upon 25th Street.”<sup>22</sup>

WTA filed a second appeal, arguing that the district court exceeded its jurisdiction by modifying the original order to include track removal, which falls within the Board’s exclusive jurisdiction over rail transportation in 49 U.S.C. § 10501(b).<sup>23</sup> Without addressing the federal preemption claim, the appellate court found that the district court’s sua sponte modification of the August 1, 2008 order was an abuse of discretion because (1) there was no evidence that it would address the underlying impossibility issue and (2) the parties had not had the opportunity to address the feasibility of the modification.<sup>24</sup> The court remanded so the parties could “propose and address the options for viably implementing the injunction . . . , including but not limited to removal of the north track at Emporia Court and/or any other legally compliant crossing location.”<sup>25</sup>

In its December 2011 remand decision, the district court ruled that the crossing should be located at Emporia Court, the north track should be removed, and WTA should lay a new line south of the existing line.<sup>26</sup>

WTA filed a third appeal reiterating its claim that the Interstate Commerce Act preempts the district court’s remedies because (1) the construction and removal of the IT are under the Board’s exclusive jurisdiction and (2) the district court’s remedies unreasonably burden interstate commerce.<sup>27</sup> The appellate court found that the district court’s remedies could only be enforced if the Board “either relinquish[ed] its jurisdiction to the district court or approve[d] of the removal and reconstruction of track to allow for the installation of a permanent railroad crossing at Emporia Court.”<sup>28</sup> The court concluded that, as a matter of law, the Board “has exclusive jurisdiction over the question of whether the WTA should be required to remove the north track and to construct a new track south of the existing tracks.”<sup>29</sup> It also concluded that it

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<sup>22</sup> FYG Reply Ex. 8, at 5. The court also added that WTA may replace the track if and when 25th Street is improved in such a way that would allow the crossing without impeding the public street. Id.

<sup>23</sup> Wichita Terminal Ass’n v. F.Y.G. Invs., Inc., 246 P.3d 696 (Kan. App. 2011).

<sup>24</sup> Wichita Terminal Ass’n v. F.Y.G. Invs., Inc., 246 P.3d 696 (Kan. App. 2011).

<sup>25</sup> Id.

<sup>26</sup> FYG Reply Ex. 10, at 4-5.

<sup>27</sup> Wichita Terminal Ass’n v. F.Y.G. Invs., Inc., 305 P.3d 13, 18 (Kan. App. 2013).

<sup>28</sup> Id. at 22-23.

<sup>29</sup> Id. at 22.

is within the Board’s exclusive jurisdiction “to determine whether constructing a permanent railroad crossing at Emporia Court is impossible or would unreasonably burden interstate commerce—even with the relocation of the north track—as WTA contends.” The district court’s August 21, 2013 order on the third remand reiterates these conclusions and directs WTA to “file an application with the STB to resolve any issues concerning the STB’s jurisdiction.”<sup>30</sup>

On October 18, 2013, WTA filed its petition requesting that the Board institute a proceeding and issue a declaratory order finding that FYG’s demand for a permanent public railroad crossing is preempted by federal law.<sup>31</sup> In the alternative, WTA requests that the Board declare that the current temporary crossing be made permanent.<sup>32</sup> As a third alternative, WTA requests that the Board establish a procedural schedule to resolve the issue of undue interference with interstate commerce.<sup>33</sup> In its petition, WTA argues that any abandonment, removal, or relocation of the IT is directly and exclusively regulated by the Board because the IT currently function as double main line tracks.<sup>34</sup> WTA also contends that the proposed crossing would unreasonably burden interstate commerce by rendering the IT useless as a conduit for interstate rail traffic, slashing the IT’s capacity, and substantially slowing interchange.<sup>35</sup>

On December 10, 2013, FYG filed its reply to WTA’s petition.<sup>36</sup> FYG requests that the Board not disturb the Kansas court rulings ordering a crossing at Emporia Court.<sup>37</sup> FYG argues that the dispute is primarily one of Kansas property law and not about regulation or interstate commerce.<sup>38</sup> It argues that the Board has no jurisdiction over the relocation of the northern track because it is not main line track but functions as excepted switching track and track used for railcar storage within the meaning of 49 U.S.C. § 10906.<sup>39</sup> FYG also argues that any interference with the IT does not unreasonably burden interstate commerce, alleging that WTA’s

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<sup>30</sup> WTA Pet. Ex. B, at 2-3.

<sup>31</sup> WTA Pet. 1, 25.

<sup>32</sup> Id.

<sup>33</sup> Id. at 25.

<sup>34</sup> Id. at 2, 10, 12-14.

<sup>35</sup> Id. at 15-18.

<sup>36</sup> By decision served on November 16, 2013, the Board granted FYG’s request for additional time to reply.

<sup>37</sup> FYG Reply 1-2.

<sup>38</sup> Id. at 1, 29-30.

<sup>39</sup> Id. at 15, 17-18, 25-27, 31, 32-33.

real concern is about the loss of the IT as a parking lot for rail cars.<sup>40</sup> Finally, FYG argues that express conditions in the 1916 Wichita ordinance, or voluntary agreement that WTA entered into, require WTA to facilitate a crossing from 25th Street at any point on the track.<sup>41</sup>

## DISCUSSION

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to terminate a controversy or remove uncertainty. In this case, there is a controversy regarding the extent to which the Board's exclusive jurisdiction over rail transportation applies to this dispute, and, as a result, the extent to which preemption applies. See 49 U.S.C. § 10501(b). Therefore, pursuant to the Board's authority under 5 U.S.C. § 554(c) and 49 U.S.C. § 721, the Board will institute a declaratory order proceeding.

The current record contains insufficient information for the Board to determine: (1) the impact on interstate commerce of the proposed Emporia Court crossing, with and without the removal and/or relocation of the north track; (2) how the IT are used by the Wichita Terminal Association, BNSF, and UP on a daily and weekly basis; and (3) the current status and applicability of the 1916 Wichita ordinance.<sup>42</sup> In order to resolve these controversies, the parties (as indicated in parentheses below) are directed to provide the following to the Board as part of their further submissions in this proceeding:<sup>43</sup>

1. A complete set of trial and hearing transcripts, journal entries, and oral or written orders and decisions by the Kansas District and Appellate courts dated after the February 20, 2007 bench trial on the first remand. (WTA)

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<sup>40</sup> Id. at 9, n.4.

<sup>41</sup> Id. at 2, 19.

<sup>42</sup> The parties need not further discuss the nature of the track, that is, whether the IT should be considered § 10906 excepted track or whether the Board has jurisdiction over the IT. See Joseph R. Fox—Pet. for Declaratory Order, FD 35161, slip op. at 4 (STB served May 18, 2009), aff'd sub nom. Joseph R. Fox v. STB, No. 09-9529 (10th Cir. May 24, 2010) (finding that § 10906 track, while excepted “from the need to obtain Board authority for construction, abandonment, or operation, is nevertheless subject to the Board’s jurisdiction and is not subject to state or local regulation”). See also United Transp. Union, Ill. Legislative Bd. v. STB, 183 F.3d 606, 612 (7th Cir. 1999) (stating that “[t]he § 10906 no-authority language means *no authority*, not *no jurisdiction*.”).

<sup>43</sup> To the extent the parties have already provided the requested documents to the Board, they need not resubmit them unless the initial submissions were excerpts from the complete documents.

2. A complete set of pleadings submitted to the Kansas District and Appellate courts by either or both parties after the February 20, 2007 bench trial and before the August 1, 2008 journal entry. This request need not include exhibits prepared specifically for proceedings before the judge, unless the parties believe those exhibits will be helpful to the Board in addressing the above-noted questions. (WTA)
3. A description of the circumstances under which Wichita Ordinance 5436 was passed; how or why WTA became the operator of the tracks discussed in the ordinance; and any changes, amendments, or modifications to the ordinance since 1916. (WTA and FYG, to the extent known)
4. A map showing all WTA tracks in Wichita, along with a description of any other tracks in Wichita, other than the IT, that are used, or could be used, to interchange rail traffic between BNSF and UP. A description of tracks in Wichita belonging to BNSF and UP individually and to WTA, and tracks not otherwise designated as WTA track that are used or could be used to interchange rail traffic. This discussion should include any facts that could impact the suitability of the tracks for interchange. (WTA)
5. A description of how the IT connects with the interstate rail network, including rail lines owned, leased, or operated by BNSF and/or UP. A description of the nature of the activities that WTA currently performs, or has performed in the last two years on the IT, including details regarding the amount of time required to perform each of those activities. Evidence, such as bills of lading, demonstrating that WTA uses the IT to transport goods in interstate commerce as part of a rail movement. Also, please discuss daily demand for interchange at Wichita as it relates to the daily capacity of the interchange at Wichita. (WTA)
6. Detailed explanations of whether and how BNSF's and UP's uses of the IT relate to their interstate railroad operations and whether and how a crossing at grade at Emporia Court would unreasonably interfere with interstate commerce as described above.<sup>44</sup> (WTA and FYG)
7. Documentation of the discussions between the City of Wichita and WTA regarding where a crossing should be constructed.<sup>45</sup> (WTA and FYG, to the extent known)

This matter will be resolved pursuant to the modified procedure rules at 49 C.F.R. § 1112. As discussed above, the Petitioners and Respondents have filed their initial pleadings.<sup>46</sup>

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<sup>44</sup> As required by Judge Bribiesca's Aug. 1, 2008 District Court journal entry.

<sup>45</sup> As required by Judge Bribiesca's Aug. 1, 2008 District Court journal entry.

As requested by WTA, the Board is establishing a procedural schedule for receiving additional evidence to resolve the outstanding issues in this case. The parties shall comply with the procedural schedule set forth in the ordering paragraph below.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A declaratory order proceeding is instituted.
2. WTA's motion for leave to file a reply to a reply is granted.
3. The procedural schedule for this proceeding is as follows:

June 4, 2014	Court documents are due to be submitted by WTA.
June 30, 2014	WTA's opening statement is due.
July 24, 2014	FYG's reply is due.
August 8, 2014	WTA's rebuttal is due.

4. This decision is effective on its service date.
5. A copy of this decision will be served on:

The Honorable Joseph Bribiesca  
18<sup>th</sup> Judicial District Court, Sedgwick County  
525 North Main Street  
Wichita, Kansas 67203

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

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(...continued)

<sup>46</sup> On January 10, 2014, the Petitioners filed a motion for leave to file a reply to a reply along with a reply to the Reply of FYG Investments. FYG filed a response in opposition on January 28, 2014. The Board will accept both filings in the interest of compiling a more complete record. See City of Alexandria, Va.—Pet. for Declaratory Order, FD 35157 (STB served Nov. 6, 2008) (allowing reply to reply “[i]n the interest of compiling a full record”); Denver & Rio Grande Ry. Historical Found.—Pet. for Declaratory Order, FD 35496, slip op. at 3 (STB served Feb. 23, 2012).